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In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

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I

The sharp divisions apparent between the Government's jurisdictional statement and appellees' motions to affirm make it abundantly clear that, whatever the merits of the respective positions, there are substantial and important questions of law presented which fully justify review of the judgment of the court below. Accepting, as the appellees must, the proposition that a violation of Section 7 of the Clayton Act has been finally adjudicated, they must also recognize that the issue as to the character of the relief required to remedy and prevent recurrence of such a

violation involves more than a review of the exercise of "discretion" by a district judge. The effectiveness of Section 7 of the Clayton Act largely depends on the nature of the relief given after violation is found: *i.e.*, whether the adjudicated illegal relationship is ordered to be terminated or rescinded, or whether lesser measures are directed in the hope that they may prove adequate to suppress the evils growing from the violation.

Appellees proceed on the premise, which is asserted as if it were a conceded fact or obvious truth, that "the judgment divests du Pont of all incidents and attributes of ownership of its General Motors stock which could or might influence the conduct of General Motors," that the judgment leaves du Pont with "bare legal title to the stock * * *, stripped of all aspects of ownership significant to the violation of the statute," and that the "ultimate question" is whether "the judgment below is defective because the legal abstraction of 'title' will be represented by one piece of paper in a vault in Wilmington rather than by thousands of pieces of paper in the hands of du Pont's stockholders." (Motion to Affirm 4.) On this premise, appellees conclude that the issue tendered by the Government's appeal is "whether punishment * * * shall be inflicted upon the stockholders of du Pont and General Motors." (*Ibid.*)

The Government denies both the premise and the conclusion. This appeal does not present a controversy over "legal title" or "pieces of paper." Section 7 is concerned with the impact of economic relationships and influence on competition and monopoly.

The Government has not brought the case here in order to establish abstract propositions of property or corporation law. The Government's objections to the district court's decree go to the fundamentals of antitrust relief. We assert that the decree is ineffective and does not adequately safeguard the public interest; that it does not undo, so far as is necessary and proper, the consequences of du Pont's violation of the Clayton Act; that the decree does not effectively terminate the economic relationships and influences between du Pont and General Motors which have been found to be illegal and which may not be allowed to continue, if Section 7 is to be enforced here; and that, viewed in the context of the long duration of these relationships and influences, the magnitude of the two enterprises, and the wide range and diversity of their operations, relief which fails to order divestment of du Pont's 23% stock ownership in General Motors also fails to eliminate the basic factor giving rise to the potentialities of anti-competitive or monopolistic consequences this Court has found and which Section 7 was enacted to prevent.

It is more rhetorical than accurate to characterize a stock divestment decree in this case as "punishment." If divestment is found to be the appropriate remedy under the statute to terminate and dissipate the effects of the violation of law which has been found, a court cannot yield to a plea of hardship and inconvenience. The public interest safeguarded by the statute is and must be paramount. In any event, it surely is not punishment that a consequence of the decree may be that some, or even many, stockholders (including those who prospered during the period of the illegal

relationships) may find themselves in situations where their federal tax liability will be greater or earlier than they anticipated. Of course, taxpayers may properly seek to order their affairs so as to minimize or spread out their tax liability. But it does not follow that any disruption of their plans or expectations in this regard as a result of a lawful judicial decree becomes "punishment."

II

The appellees deny that divestment of the illegally held stock is the type of relief prescribed by the statute for a violation of Section 7. (Motion 6–12.)

In a proceeding by the Federal Trade Commission to enforce Section 7, Section 11 of the Clayton Act gives the Commission no discretion in choice of remedy—if it finds a violation of Section 7, it "shall issue" an order requiring the offender to "divest itself of the stock * * * held" contrary to Section 7's provisions. The Commission is thereby commanded to order stock divestment and, as held in *Federal Trade Commission* v. *Western Meat Co.*, 272 U.S. 554, and *Arrow-Hart & Hegeman Electric Co.* v. *F.T.C.*, 291 U.S. 587, it is authorized to grant no other form of relief.[1] Our jurisdictional statement also cited (p. 8)

[1] In *Arrow-Hart* the Court said (291 U.S. at 594–595): "Section 11 specifies *the* remedy which the Commission may apply, *namely*, that it may, after hearing, order the violator to divest itself of the stock held contrary to the terms of the Act" (emphasis added). In the words of the dissent in that case, the Court's holding was that "as the statute in terms specifies only a single method by which compliance can be compelled—ordering the offender to divest itself of the stock—the Commission can make no other form of order." *Id.* at 600.

To the extent that *Arrow-Hart* can be said to sanction retention of stock illegally acquired (Motion, fn. 7, p. 10), the

the Commission's consistent prescription of stock divestiture upon a finding of violation of Section 7.[2]

The appellees contend that even if stock divestment is prescribed as the remedy when the Commission is enforcing Section 7, this prescription does not apply to an enforcement proceeding brought by the United States under Section 15 of the Act. But the legislative history to which appellees refer (Motion 8) does not support this contention.

The bill which became the Clayton Act, as passed by the House, adopted the Sherman Act's enforcement scheme—violation of its prohibitions was made a misdemeanor and the United States was empowered to bring civil proceedings to restrain violation (H. Rep. 627, 63d Cong., 2d Sess., 1–2, 3–4). But the bill, as amended by the Senate Judiciary Committee, eliminated the criminal penalty and provided for enforcement "through the agency of the Federal Trade Com-

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basis of decision was, not that Section 11 gives the Commission discretion to sanction such retention, but that certain transactions subsequent to issuance of the complaint had deprived the Commission of "jurisdiction" (*id.* at 596) and of authority to issue "any order" against the acquiring corporation (*id.* at 594).

Western Meat held (272 U.S. at 559–560) that Section 11 contemplates a stock divestment which is "actual and complete" and which will bar violation of the Act "through continued ownership" of the stock illegally acquired, and that the Commission may therefore order stock to be so divested as to include therein assets of the company whose stock was illegally acquired.

[2] As to the various Federal Trade Commission consent orders cited by appellees (Motion 11, fn. 8), they are not inconsistent with the position we urge here.

mission";[3] enforcement of Section 7, said the Committee, is "confided * * * to" that Commission (S. Rep. 698, 63d Cong., 2d Sess., 42, 47). Section 11 (then Section 9B) was described as providing "the administrative agency" through which Sections 2, 3, 7, and 8 "are to be enforced" (*id.* at 48), and all that was said about Section 15 was: "This section, which is existing law, is not proposed to be amended in any particular" (*id.* at 50).[4]

Since Congress adopted the Senate Committee changes, under which Section 7 was to be enforced by the Trade Commission and stock divestment was the remedy it was to apply, Congress specified such divestment as the necessary and appropriate relief for violation of Section 7. The court below treated any such specification as irrelevant to its determination of requisite relief (Op. 22), and this construction of the statute presents, we submit, a substantial question clearly meriting review by this Court.

The appellees also urge that, since the language of Section 15 of the Clayton Act parallels that of Section 4 of the Sherman Act, decisions under that Act are part of Section 15's "background and history."

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[3] The enforcing agency against common carriers was the Interstate Commerce Commission, and against banks, the Federal Reserve Board.

[4] The statement on Section 15 quoted by appellees (Motion 8) is the statement of the House Judiciary Committee, not of the Senate Judiciary Committee. H. Rep. 627, 63d Cong., 2d Sess., 21; see S. Rep. 698, 63d Cong., 2d Sess., 2, 17.

But Sherman Act decisions show that stock divestment is the necessary remedy where violation of the Act consists of acquisition of stock of a competitor or competitors (see Juris. St. 9). The two decisions by this Court which appellees cite (Motion 8–9) do not hold otherwise. In *United States* v. *Terminal Railroad Assn.*, 224 U.S. 383, the illegal combination involved both acquisitions and various restrictive agreements, but the Court's finding of "violation of the statute" was predicated on the latter. 224 U.S. at 410. In *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, cartel agreements allocating markets and otherwise restraining trade constituted the Sherman Act violation, and the question on which this Court divided (4 to 3) was whether the judgment, in addition to barring such cartel agreements, should require divestment of stock interests acquired in foreign participants in the cartel.

III

In attempting to sustain the reasonableness of the order of the court below, the appellees characterize the relief in a manner which we believe is inaccurate. They state that the order strips du Pont of "all incidents and attributes of ownership" of its General Motors stock other than "the legal abstraction of 'title'" (Motion 4–6) and leaves in du Pont only the "bare" or "naked" legal title. Actually the decree would leave intact du Pont's 23% equity ownership of General Motors, carrying the right to receive a yearly dividend income of $126,000,000 at current

rates[5] and the right to any increment in capital value, a right which from the time of original acquisition has multiplied the value of du Pont's investment twenty-fold. Even as to voting rights, they are to remain tied to the du Pont stock, although exercised by the individual stockholders rather than the corporation.[6] In view of the size of the two enterprises and the diversity of their activities, there are sure to be numerous instances where the operations of one will, directly or indirectly affect the other, and in every such instance du Pont could not overlook its interest in General Motors, nor could General Motors act in disregard of the over-hanging authority of du Pont's interest in it. Thus, the retention of ownership by du Pont, plus the exercise of the voting rights by its stockholders, perpetuates the relationships between the corporations. In short, it would still be likely after the district court's decree that General Motors would be deterred from taking actions that might be in its own, but not du Pont's, interest. To that extent, competition would continue to be lessened and the prohibitions of Section 7 would continue to be unenforced. It is not suggested that

[5] Du Pont brushes aside the fact that it will continue to receive General Motors dividends with the explanation that they will be handed on to the stockholders as they have been in the past. Motion 4, fn. 2, 15. But this is a decision of corporate policy, not a legal requirement. The income is income to du Pont and when it hands it on as dividends it is making an ordinary distribution of earnings. Surely du Pont does not feel the same disinterest in its other income because in large part it is handed on to the stockholders.

[6] Du Pont suggests that the same result would follow from a distribution of its General Motors stock to its stockholders. Motion 16. But that result would be temporary only and soon dissipated. Under the lower court's order the relationship would continue indefinitely.

there would be a "conspiracy" among the du Pont stockholders to vote their stock as a unit; the point is, rather, that they would continue to have a common interest which would of necessity be reflected in their possession and exercise of the voting rights and which could not avoid being a factor in the relationships between the two companies.[7]

CONCLUSION

Probable jurisdiction should be noted.[8]

Respectfully submitted.

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[7] It would be a bold General Motors management which, for example, entered a field of activity in competition with du Pont with the knowledge that such a move would cut into the profits of 23% of General Motors stockholders.

[8] Christiana Securities Company and Delaware Realty and Investment Company present an additional argument for affirmance, namely, that the judgment below is tentative in nature and may be changed if it proves not to be effective. Christiana Motion 6. We do not read the decree or the opinion as tentative, but if these appellees are correct in their interpretation, then certainly the order should be reviewed. At the very least, the public is entitled to a definitive order designed to give them the protection contemplated by the Act.

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